91-481

NO. _____

IN THE

Supreme Court of The United States

OCTOBER TERM, 1990

VICTOR C. BARIS, et al.,
Petitioners,

- versus -

CALTEX PETROLEUM, INC., CALTEX PETROLEUM CORPORATION, and CALTEX OIL CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does lack of removal jurisdiction constitute a "defect in removal procedure" or a substantive jurisdictional defect, which is not subject to waiver for failure to file a motion for remand in 30 days under 28 U.S.C. § 1447(c) (amended Nov. 19, 1988)?

2. Does a federal court's exercise of admiralty subject matter jurisdiction in a "saving to suitors" case, which is removed without diversity, violate traditional concepts of federalism and rights to trial by jury?

LIST OF PARTIES

Victor C. Baris
Sivirino Carreon
Bulig-Bulig Kita Kamaganak Association
Renato Asistorga
Pedro B. Sorima
Arnel N. Galang
Elsa Montiagodo
Erasto Maghacut
Isabel Magno
Lorita Acosta Acebedo
Violeta Sabulao Faiyaz
Julieta Benaso
Ecolastica Baldo
Jose Baguhin ..... Petitioners[1]

Caltex Petroleum, Inc.
Caltex Petroleum Corporation
Caltex Oil Corporation ..... Respondents

Sulpicio Lines, Inc.
Caltex Philippines, Inc.
Caltex Asia, Ltd.
California Texas Oil Corp.
Caltex Philippines Petroleum Company, Inc.
Caltex International Limited
Caltex International Services Limited
Caltex Oceanic Limited
Caltex Oil Corp. (Delaware)
Caltex Oil Corp. (New York)
Caltex Oil Products
Caltex (Overseas) Limited
Caltex Services (Philippines), Inc.

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1. This action was brought as a class action and also individually by the personal representatives, survivors, and beneficiaries of decedents, all of whom were separately listed in the Notice of Appeal filed in the Fifth Circuit.

Caltex Trading and Transport Corporation
The Caltex Group
Caltraport (Far East) Company
Caltex Investment and Trading Limited
Caltex Services Corporation
American Overseas Petroleum Limited
P.T. Caltex Pacific Indonesia
Steamship Mutual Underwriting
Association (Bermuda) Limited
Vector Shipping Corp. ..... Unserved Defendants

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OCTOBER TERM, 1990

VICTOR C. BARIS, et al.,
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- versus -

CALTEX PETROLEUM, INC., CALTEX PETROLEUM CORPORATION, and CALTEX OIL CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Victor C. Baris, et al., file this brief in support of their request that the petition be granted.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 932 F.2d 1540 and is reproduced in the appendix at App. 1-23.

The order of the United States District Court for the Southern District of Texas is unreported and is reproduced in the Appendix at App. 24-27.

JURISDICTION

This Court's jurisdiction is sought to review a final judgment of a court of appeals, pursuant to 28 U.S.C. § 1254. The Fifth Circuit's judgment was filed on June 17, 1991. No rehearing was sought.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the proper construction of a 1988 amendment to the removal statute, 28 U.S.C. § 1447(c) (amended Nov. 19, 1988). The full text of that statute is reproduced in the Appendix at App. 28.

This case also involves the proper construction of federal admiralty subject matter jurisdiction and the "saving to suitors" clause in 28 U.S.C. § 1333(1). The full text of that statute is reproduced in the Appendix at App. 28. The constitutional right to trial by jury, which was preserved in the "saving to suitors" clause, is found in U.S. CONST. amend. VII, which is reproduced in the Appendix at App. 28.

STATEMENT OF THE CASE

This petition seeks review of a Fifth Circuit opinion which expands the limits of federal jurisdiction. The factual basis of that opinion is as follows:

1. *The State Court Suit.* The Petitioners represent survivors and decedents of the largest marine disaster in history. On December 20, 1987, approximately 5,000 Philippine citizens lost their lives in the collision of the M/V DONA PAZ and the M/T VECTOR in the Tablas Strait in the Philippines. The respondents, Caltex Petroleum, Inc., Caltex Petroleum Corporation, and Caltex Oil Corporation (hereinafter collectively referred to as

"Caltex"), corporations with their principal place of business in Texas, were the charterers of the M/T VECTOR.

The Petitioners brought suit, individually and as a class action, against Caltex, and others, in Texas state court pursuant to 28 U.S.C. § 1333(1) (the "saving to suitors" clause) and Tex. Civ. Prac. & Rem. Code § 71.031 (the "open forum" statute).

2. *The Removal.* On February 21, 1990, Caltex removed the state court suit to the United States District Court for the Southern District of Texas. Caltex based its right to remove on federal admiralty jurisdiction, 28 U.S.C. § 1333(1), and federal question jurisdiction under the unpleaded Death on the High Seas Act (DOHSA), 46 U.S.C. § 761. Diversity jurisdiction does not exist in this case and was not sought on removal.

On March 2, 1990, Caltex filed a "motion to dismiss and answer" which alleged a number of "defenses," including forum non conveniens, improper venue, and failure to state a claim.

3. *Improper Venue Orders.* On April 4, 1990, without a hearing, the federal district court found the "motion" unopposed because no response had been filed within 20 days under the local rules, and dismissed the case for improper venue.

4. *Motion to Remand.* On April 16, 1990, at the earliest opportunity after they received the district court's order, the Petitioners filed a motion for new trial, for reconsideration, and for remand. In that motion, among other things, the Petitioners asserted that the case was improperly removed, that there was no federal subject matter jurisdiction over the claims, and that venue was proper as a matter of law. The Petitioners prayed for remand to the state court.

5. *The District Court's Dismissal.* On June 13, 1990, again without a hearing, the district court entered its final order. App. 24-27. The district court held as follows:

- that the DOHSA and general maritime claims were improperly removed;
- that even though the DOHSA claims were improperly removed, the court had subject matter jurisdiction because the claims "could have originally been brought in federal court."
- that improper venue is not a proper ground for dismissal in a removed case; and
- that the case should be dismissed for *forum non conveniens*.

This dismissal was appealed to the Fifth Circuit.

6. *Waiver Under 28 U.S.C. § 1447(c).* For the first time on appeal, Caltex argued that the Petitioners had waived their right to challenge the district court's lack of removal jurisdiction by failure to file a motion to remand within 30 days, which Caltex alleged was required under the 1988 amendments to 28 U.S.C. § 1447(c). The Fifth Circuit agreed.

The Fifth Circuit assumed, without deciding, that the case had been improperly removed. App. 5, 7. However, the Fifth Circuit held that the district court's lack of removal jurisdiction was a "defect in removal procedure." App. 9. Since the Petitioners did not challenge that "defect in removal procedure" by filing a motion to remand within 30 days, the Fifth Circuit held that, under 28 U.S.C. § 1447(c), the Petitioners' jurisdictional challenge was waived. App. 5, 10.

7. *Subject Matter Jurisdiction.* The Fifth Circuit recognized that parties cannot waive a defect in the subject matter jurisdiction of the district court. App. 11. However, the Fifth Circuit held that the question of federal court subject matter jurisdiction was "whether the federal district court would have had jurisdic-

tion over the case had it originally been filed in federal court." App. 12.

Despite the fact that Petitioners had asserted their right to a law remedy under the "saving to suitors" clause of 28 U.S.C. § 1333(1), the Fifth Circuit held that the district court could exercise admiralty jurisdiction over the claims since the Petitioners *could have brought* their claims in federal court in admiralty. App. 14 (emphasis in original).

8. *Final Judgment.* The Fifth Circuit held that the federal district court properly exercised jurisdiction over the claims. App. 16. It is from that judgment that this petition is taken.

After holding that the district court had jurisdiction the Fifth Circuit reversed the district court's forum non conveniens dismissal and remanded for proper analysis of forum non conveniens factors.

REASONS FOR GRANTING THE WRIT

I. There Exists an Irreconcilable Conflict as to Whether Lack of Removal Jurisdiction Is a "Procedural" Defect, Subject to 30-Day Waiver.

In the opinion below, the Fifth Circuit held that Petitioners had waived their right to contest the federal district court's lack of removal jurisdiction because the Petitioners did not file a motion to remand within 30 days, under 28 U.S.C. § 1447(c). In so doing, the Fifth Circuit liberally construed the phrase "defect in removal procedure" (which requires a 30-day motion to remand) so as to include a substantive defect in jurisdiction (which is not mentioned in the statute).

The Fifth Circuit's construction of 28 U.S.C. § 1447(c) is in sharp conflict with the construction given to the same statute by

other Circuits. Petitioners will first address the conflict, and then address the national importance of resolving that conflict.

A. The Conflict.

At issue here is the proper construction of the 1988 amendment to 28 U.S.C. § 1447(c). The prior version of Section 1447(c) read:

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs.

28 U.S.C. § 1447(c) (1982).

The current version of that section reads, in part,[1]

> A motion to remand the case on the basis of *any defect in removal procedure* must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. § 1447(c) (amended Nov. 19, 1988) (emphasis added).

A real and important conflict has developed among the Circuit Courts of Appeals as to the proper construction of the phrase "any defect in removal procedure."

1. "Defect in Removal Procedure" Means What It Says.

One line of thinking holds that the statutory language is clear on its face. *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1213 (3d Cir. 1991). As the Third Circuit stated, "[i]ndeed, section

1. The full text of 28 U.S.C. § 1447(c) is reproduced in the Appendix at App. 28.

1447(c) could not be clearer . . . ." *Id.* Where there is no ambiguity in a statute, the court held, there is no need to examine the legislative history. *Id.* To go behind the plain language of the statute would be contrary to the rules of statutory construction. *Id.* (citing *Rubin v. United States*, 449 U.S. 424, 430 (1981); *United States v. Ron Pair Enterprises*, 489 U.S. 235, 109 S. Ct. 1026, 1031 (1989)).

Despite this prohibition, the Third Circuit looked at the legislative history[2] and found it ambiguous. *Id.* The court concluded,

> Accordingly, as the statute is clear on its face and the legislative history ambiguous at best, the district court was correct in holding that section 1447(c)'s requirement that "[a] motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal" applies only to motions for remand on the basis of any defect in removal procedure.

Id. (emphasis added). The court cited three other opinions which appear to share that view. *See State v. Ivory*, 906 F.2d 999, 1000 n.1 (4th Cir. 1990) ("the thirty-day limitation applies only to objections to defects in removal procedure"); *Air-Shields, Inc. v. Fullam*, 891 F.2d 63, 65 (3d Cir. 1989) ("[t]he 1988 version of Section 1447(c) omits the previous 'improvidently removed' grounds for removal and restricts the time for remand motions based on procedural defects"); *Corcoran v. Ardra Ins. Co.*, 842 F.2d 31, 33-34 (2d Cir. 1988) (recognition that there are other grounds for remand not addressed by § 1447(c)).

Since the plaintiff there raised a nonprocedural ground for remand (a contractual forum selection clause), the Third Circuit

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2. The full text of the legislative history which discusses the 1988 amendment to § 1447(c) in the Report of the House Judiciary Committee, H.R. Rep. No. 889, 100th Cong., 2d Sess. 72, *reprinted in* 1988 Cong. & Admin. News 5982, 6033, is reproduced in the Appendix at App. 29.

held that the plaintiff's motion to remand was not barred by the 30-day time limit of 28 U.S.C. § 1447(c). *Foster*, 933 F.2d at 1219.

2. "Defect in Removal Procedure" Does Not Mean What It Says.

A second line of thinking, represented by this case and apparently adopted only by the Fifth Circuit, holds that a "defect in removal procedure" does not mean a "procedural defect" in the plain sense. *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1544 (5th Cir. 1991); App. 7. Rather, "a 'procedural' defect is any defect that does not go to the question of whether the case originally could have been brought in federal district court." *Id.* Thus, under the Fifth Circuit's view, a "defect in removal procedure" includes not only "procedural" defects, but also "substantive" defects. *Id.* at 1545; App. 8-9.

With this interpretation, the Fifth Circuit held that Petitioners' motion to remand based on the district court's lack of removal jurisdiction (which the court recognized as a "substantive" defect) was waived by the 30-day time limit in 28 U.S.C. § 1447(c). *Id.* The court cited two other Fifth Circuit opinions that appear to share that view. *See In re Shell Oil Co.* ("Shell I"), 932 F.2d 1518, 1521 (5th Cir. 1991) (construes "defect in removal procedure" to include "all nonjurisdictional defects existing at the time of removal"); *In re Shell Oil Co.* ("Shell II"), 932 F.2d 1523, 1527 n.6 (5th Cir. 1991) ("[a]s amended, § 1447(c) requires that motions for remand must be made within 30 days of removal, except in cases in which the court lacks subject matter jurisdiction").

B. The National Importance of this Conflict.

This conflict is clearly drawn. If not resolved, courts and litigants will not know when, or if, a procedural defect is a

procedural defect, or if it is, as the Fifth Circuit holds, something else entirely. The conflict presages significant consequences for all litigants.

First, the conflict cuts deeply into the rules of statutory construction. The statute is clear on its face. The statute requires that a motion for remand *based upon a defect in removal procedure* be filed within 30 days after removal. 28 U.S.C. § 1447(c). That statute is immediately preceded by 28 U.S.C. § 1446, which is entitled "Procedures for removal." The statute does not impose a time limit on motions for remand which are not based on procedural defects.

Litigants and courts are entitled to rely on what a statute says. This case presents an important opportunity for this Court to clarify the rules of statutory construction, and to reaffirm the principle that legislative history (particularly where ambiguous) should not be permitted to override clear statutory language.

Second, and perhaps more importantly, the conflict has the potential to dramatically expand federal jurisdiction — at a time when both the courts and Congress have sought to restrict federal jurisdiction and relieve the overburdened dockets of federal courts.

Under the Fifth Circuit interpretation, even if a federal court could never acquire substantive removal jurisdiction, a federal court *must* exercise jurisdiction if a motion to remand is not filed within 30 days. Such an interpretation would encourage state court defendants to remove all nonfederal matters, in hope that state court plaintiffs will not catch on to the novel interpretation of "procedural" defect, and will blindly, as here, file their jurisdictional motions to remand after the thirtieth day. The result of this sort of ploy will be to force the federal courts to accept cases which should never have been brought to federal court in the first place.

Certainly, a plaintiff can waive the court's lack of removal jurisdiction. It can be waived if "a case is tried on the merits without objection . . . ." *Grubbs v. General Electric Corp.*, 405 U.S. 699, 702 (1972). It can be waived, under the view of some courts, if the plaintiff engaged, without objection, in conduct which invoked federal jurisdiction. *See, e.g., Kidd v. Southwest Airlines Co.*, 891 F.2d 540, 546 (5th Cir. 1990) (plaintiff amended her complaint to add a federal claim); *Dukes v. South Carolina Ins. Co.*, 770 F.2d 545, 548 (5th Cir. 1985) (plaintiff participated in federal discovery); *Fontenot v. Global Marine, Inc.*, 703 F.2d 863, 871 (5th Cir. 1983) (plaintiff fully participated in conduct of action without objection).

But, a federal court's lack of removal jurisdiction cannot be not waived where, as here, there has been no trial on the merits and no participation by the plaintiff in the federal forum. *Chivas Products Limited v. Owen*, 864 F.2d 1280, 1286-87 (6th Cir. 1988); *Dyer v. Grief Brothers, Inc.*, 766 F.2d 398, 401 (9th Cir. 1985). The waiver principle was developed to encourage judicial economy and to discourage "jurisdictional sandbagging." *Federal National Mortgage Ass'n v. LeCrone*, 868 F.2d 190, 194 (6th Cir. 1989). Neither concern exists where there has been a "minimal investment of the parties' time in discovery or of the court's time in judicial proceedings or deliberations." *Chivas Products*, 864 F.2d at 1287.

The Fifth Circuit interpretation turns these policies on their head. By holding that a "defect in removal procedure" includes substantive defects, the Fifth Circuit encourages judicial waste and jurisdictional ambiguity. After the thirtieth day, a federal court will be bound to entertain all improperly removed cases that could have been (but were not) filed in federal court. The narrow concept of removal jurisdiction will be restricted not by our carefully delineated removal statutes, but will rather be restricted only by a 30-day time line.

Such an interpretation finds no justification in proper statutory construction. Not only is the plain meaning of a statute conclusive, but also for "approximately five score years" the federal courts "have construed the removal statutes strictly and, on the whole, against the right of removal." J. Moore & B. Ringle, 1A *Moore's Federal Practice* ¶0.157[1.3] at 38 (1990). The Fifth Circuit's liberal reading of "procedural" defect will needlessly expand our removal statutes and will dramatically increase the congestion in our federal courts.

Because this conflict has the potential to create great confusion among courts and litigants on the nationally important matter of federal removal jurisdiction, the Petitioners respectfully request that this Court grant the petition to resolve this question.

II. There Exists an Irreconcilable Conflict as to Whether a Federal Court Can Exercise Admiralty Jurisdiction Over a "Saving to Suitors" Case Removed Without Diversity.

A second issue of national importance was also raised by the opinion below. Despite the fact that this maritime claim was originally brought in state court as an action *at law* under the "saving to suitors" clause, the Fifth Circuit held that the district court could properly assert subject matter jurisdiction in *admiralty* because the claims "could have been brought" in admiralty. This transformation of a law remedy into an admiralty remedy upsets 200 years of admiralty jurisprudence and strikes at the very heart of federalism.

In order to understand this conflict, it is first necessary to understand why the Fifth Circuit opted for a "could have been brought" jurisdiction in the first place. Then, Petitioners will address the conflict and the important reasons why this Court should resolve it.

A. Origins of Subject Matter Jurisdiction.

In a case in which this Court recently granted certiorari jurisdiction to resolve another issue involving proper construction of the removal statutes, this Court held:

> Since the district court had no original jurisdiction over this case . . . . a finding that removal was improper deprives that court of subject matter jurisdiction and obliges a remand under the terms of § 1447(c).

International Primate Protection League v. Administrators of Tulane Educational Fund, 111 S. Ct. 1700, 1709 (1991).

To determine whether a federal district court has original subject matter jurisdiction after removal, federal courts look at the plaintiff's complaint as it existed at the time the defendant filed the removal petition. *Kidd v. Southwest Airlines Co.*, 891 F.2d 540, 546 (5th Cir. 1990). If, based on review of that complaint, it is determined that the case was improperly removed, the case must be remanded. *Id.; see also Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 702 (1972).

An alternative means of determination of subject matter jurisdiction after removal exists if the removed case is tried on the merits without objection. *Grubbs*, 405 U.S. at 702. Under that situation — which does not exist in this case (i.e., no "trial on the merits") — the court must determine "whether the federal district court would have had original jurisdiction of the case had it been filed in that court." *Id.* To make that determination, the court looks at the plaintiff's complaint "at the time the district court enters judgment . . . ." *Kidd*, 891 F.2d 546; *Grubbs*, 405 U.S. at 702; *American Fire & Casualty Co. v. Finn*, 431 U.S. 6, 15 (1951).

The Fifth Circuit below invoked the "could have been filed" jurisdiction of the district court by equating the 30-day procedural defect waiver provision of 28 U.S.C. § 1447(c) with the *Grubbs*

"trial on the merits" waiver. *Baris*, 932 F.2d at 1545 n.7; App. 10. Thus, the Fifth Circuit held that since lack of removal jurisdiction was a "procedural" defect, the determination of whether federal subject matter jurisdiction existed involved whether Petitioners "could have brought" their claims originally in federal court. *Id.* at 1546; App. 11. The Fifth Circuit then held that Petitioners' claims could have been brought in federal court, in *admiralty*. *Id.* at 1547; App. 14.

Assuming, for argument's sake, that the "could have been filed" jurisdictional analysis even applies in this case, the Fifth Circuit's determination conflicts with well-settled limits on federal court jurisdiction.

B. The Conflict.

The Petitioners' complaint was the same both at the time the case was removed and at the time judgment was entered. The Petitioners had invoked their "historic option" by pleading the "saving to suitors" clause of 28 U.S.C. § 1333(1) in state court. *See Romero v. International Terminal Operating Co.*, 358 U.S. 354, 371 (1959).

The invocation of the "saving to suitors" clause and the filing of the action in state court carries with it certain substantive consequences. First, the "saving to suitors" pleading invoked the law remedy enforceable in state courts and enforceable on the law side of the federal courts only where diversity exists. *Id.* at 363. Second, the "saving to suitors" pleading invoked the concurrent jurisdiction of state courts "which it was the unquestioned aim of the saving clause of 1789 to preserve." *Id.* at 372.

It is well settled that once a plaintiff has invoked the "saving to suitors" clause, the action *cannot* be removed to federal court on the basis of admiralty jurisdiction. *Id.* at 371-72; *Alleman v. Bunge Corp.*, 756 F.2d 344, 345-46 (5th Cir. 1984). Where

diversity does not exist, as here, the case "is not in the federal admiralty court's jurisdiction." *Alleman*, 756 F.2d at 346.

The Fifth Circuit was not at liberty to disregard the fact that this saving clause case had been originally filed in state court in the determination of whether the claim "could have been filed" in federal court. The case that best illustrates this is *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951).

In *Finn*, the Court was asked to consider whether a case should be remanded for lack of subject matter jurisdiction when there was no diversity. The Court evaluated whether subject matter would exist either based on the complaint when first filed or based on the pleadings at the time of judgment. The Court held:

> In this case, however, the District Court would not have had original jurisdiction of the suit, as first stated in the complaint, because of the presence on each side of a citizen of Texas .... The posture of this case even at the time of judgment also barred federal jurisdiction. A Texas citizen was and remained a party defendant.

Id. at 541-42.

Similarly here, federal jurisdiction was barred because the Petitioners had invoked the "saving to suitors" clause in state court, and there was no diversity. The invocation of the "saving to suitors" clause prevented the federal court from taking cognizance of the claim, the jurisdiction of which was reserved to state courts. *Romero*, 358 U.S. at 374-75. A federal court could never acquire admiralty jurisdiction over a state court "saving to suitors" clause case.

The consequences of placing a "saving to suitors" claim in the "could have been filed" jurisdiction of the federal district court has been addressed by a leading commentator:

> [I]f removal of saving clause cases were allowed simply on the ground that the case *could have been brought* in a federal court as an admiralty claim under Section 1333, the result

> would be either 1) that the federal court would have to treat it as an admiralty claim, thereby defeating the purposes underlying the availability of a law remedy under the saving clause, or 2) that the federal court would adjudicate what is a maritime case as if it were one at law, thereby defeating the purposes sought to be achieved in *Romero* in nondiversity cases, but only when none of the defendants is a citizen of the state. Neither of these alternatives is attractive.

C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure*, § 3674 at 466-67 (2d ed. 1985) (emphasis added).[3]

This commentary highlights two reasons why a "saving to suitors" case filed in state court does not fall within the "could have been filed" admiralty jurisdiction of the federal court. To do so would transform a law remedy, with a right to jury trial, to an admiralty remedy, with no right to jury trial. To do so would also transform a claim over which Congress has specifically provided state jurisdiction into a claim of federal jurisdiction based on no more than congressional silence or ambiguity. This conflict in jurisdiction demands resolution.[4]

C. The National Importance of this Conflict.

Again, there is a sharp conflict between this Court's resolution of state and federal jurisdictional disputes in *Romero* and *Finn* and the erroneous jurisdictional analysis applied below. And again, the expansion of federal jurisdiction is contrary to the strict

3. Charles Alan Wright represents the Respondents in this appeal.

4. The Respondents characterized Petitioners' complaint as a DOHSA claim, despite the fact that Petitioner's well-pleaded complaint did not mention DOHSA. The Respondents would argue that DOHSA is not subject to the "saving to suitors" clause and that a DOHSA claim could have been brought in admiralty. However, as this Court recognized, DOHSA contains its own savings clause which preserves state jurisdiction. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 232 (1985). Certainly Petitioners' assertion of state court jurisdiction in the complaint preserved such jurisdiction over any DOHSA claim.

construction of removal jurisdiction and will trigger a needless increase in the burdens on federal courts.

But the problems presented here run far deeper than mere analytical disputes or judicial efficiency. Rather, the problems presented here cut to the core of our traditional concepts of jurisdiction.

On the one hand, the Fifth Circuit's transformation of an action at law under the "saving to suitors" clause to an action in admiralty has stripped the Petitioners of their rights to a trial by jury. This transformation has constitutional implications. *See* U.S. CONST. amend. VII.

On the other hand, this expansion of federal jurisdiction over "saving to suitors" claims has upset the carefully wrought balance of power between federal and state courts. As the Court said in *Romero*:

> This sharing of competence in one aspect of our federalism has been traditionally embodied in the saving clause of the Act of 1789. Here, as is so often true in our federal system, allocations of jurisdiction have been carefully wrought to correspond to the realities of power and interest and national policy. To give a novel sweep to the Act would disrupt traditional maritime policies and quite gratuitously disturb a complementary, historic interacting federal-state relationship.

Romero, 358 U.S. at 374-75.

This Court should resolve these issues in order to prevent further unwarranted expansion of federal jurisdiction and erosion of federalism.

CONCLUSION

To reach the result below, the Fifth Circuit had to transform a substantive jurisdictional defect into a procedural defect, and had to transform an action at law into an action in admiralty. In doing so, the Fifth Circuit has placed itself in direct conflict with other Circuits in the construction of 28 U.S.C. § 1447(c), and in direct conflict with this Court's opinions on jurisdiction. Because these significant conflicts are of national importance and are likely to recur, Petitioners ask this Court to resolve both questions presented.

For the above reasons, Petitioners respectfully pray that their petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

No. 90-2646

United States Court of Appeals
FIFTH CIRCUIT

VICTOR C. BARIS
et al., Plaintiffs — Appellants

v.

SULPICIO LINES, INC.
et al., Defendants.

CALTEX PETROLEUM, INC., CALTEX PETROLEUM CORPORATION, AND CALTEX OIL CORPORATION
Defendants-Appellees

June 17, 1991

Appeal from the United States District Court for the Southern District of Texas.

Before THORNBERRY, JOLLY, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

This appeal raises issues regarding federal court jurisdiction over a removed case and the doctrine of forum non conveniens. The district court concluded that it had jurisdiction, then dismissed pursuant to the doctrine of forum non conveniens. We conclude that, while the court had jurisdiction over this removed action, its analysis of the forum non conveniens issue was deficient. Accordingly, we vacate and remand.

I.

On December 20, 1987, approximately 5,000 citizens of the Philippines lost their lives in the collision of the M/V DONA PAZ and the M/T VECTOR in the Tablas Strait between Mindoro and Marinduque Islands in the Philippines. Defendants Caltex Petroleum, Inc., Caltex Petroleum Corporation, and Caltex Oil Corporation (the "defendants"), corporations with their principal place of business in Texas, were the charterers of the M/T VECTOR. The plaintiffs, representing four survivors and a large number of descendents, brought suit individually and as a class action (not yet certified) to recover compensation for the injuries and deaths.

II.

The suit was filed in state district court "pursuant to the laws of the United States, including the general maritime law, and, pursuant to the savings [sic] to suitor's [sic] clause, 28 U.S.C. § 1333(1), as well as such other federal and state laws as may be applicable including § 17.031 of the Texas Civil Practice and Remedies Code." On February 21, 1990, the defendants removed the matter to federal district court, asserting a right of removal under 28 U.S.C. § 1441(b) and claiming that the suit arises "under the admiralty and maritime jurisdiction of the [federal] court pursuant to 28 U.S.C. § 1333(1) and the Death on the High Seas Act [DOHSA], 46 U.S.C. § 761."

The defendants then answered and moved to dismiss on the basis of, among other grounds, forum non conveniens. For various reasons that, according to the plaintiffs, are not revelant to this appeal, the plaintiffs failed to respond to the motion to dismiss. On April 10, 1990, the district court dismissed the case, deeming the motion unopposed and basing dismissal upon Fed.R.Civ.P. 12(b)(3)—improper venue.

On April 16, 1990, the plaintiffs moved for new trial, reconsideration, and remand. They asserted that the district court had no subject matter jurisdiction because the case had been improperly removed, that dismissal cannot be based solely upon a failure to respond, and that venue was proper. The plaintiffs also asked the court to set aside its dismissal order as a matter of law or equity and to remand to state court.

The defendants responded, not by supporting improper venue as a ground of dismissal, but by requesting the court to change the basis of its dismissal to forum non conveniens. Without affording plaintiffs an opportunity to reply, the court on June 15, 1990, entered its final order, declaring that the DOHSA and general maritime claims had been improperly removed; that the plaintiffs' failure timely to respond to the motion to dismiss was not the basis for the dismissal; that improper venue is not a proper ground for dismissal in a removed case; and that the court had subject matter jurisdiction, despite the improper removal, since the case could have been filed originally in federal court. The court amended its order of April 10 to reflect forum non conveniens, rather than improper venue, as the reason for dismissal. The plaintiffs appeal from the order of June 15.

III.

We must determine, initially, whether the federal district court had jurisdiction over this removed action. If it did not have jurisdiction at the time it ruled on the question of *forum non conveniens*, we may not consider that issue and must direct the district court to remand the entire proceeding to state court.

The plaintiffs assert, and the district court held in its order of June 15, that the matter was improperly removed. There is authority for that conclusion although, as we explain *infra*, we need not decide that specific issue.

This action was filed in state court pursuant to the so-called "saving to suitors" clause of section 1333(1).[1] That provision has been construed to permit admiralty and maritime actions, otherwise exclusively within the jurisdiction of the federal district courts, to be brought in state court as well 1S. Friedell, *Benedict on Admiralty* § 122 (6th ed. 1991).

[1] In the instant case there is no diversity of citizenship. In *Alleman v. Bunge Corp.*, 756 F.2d 344, 345-46 (5th Cir. 1984), we observed that where plaintiffs have exercised their "historic option" (quoting *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 371, 79 S.Ct. 468, 479, 3 L.Ed.2d 368 (1959)), to bring an action in state court under the saving to suitors clause, the matter cannot be removed in the absence of diversity. Although there had been some doubt as to whether DOHSA claims may be brought exclusively in the federal courts, the Supreme Court recently has stated that DOHSA jurisdiction is concurrent, *i.e.*, that a DOHSA action can be brought in either state or federal court. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 225, 106 S.Ct. 2485, 2495-96, 91 L.Ed.2d 174 (1986).[2]

Thus, we treat this action as one properly brought in state court under DOHSA. If it is removable, the non-preempted survival claims and any general maritime injury claims are removable pursuant to the federal district court's pendent jurisdiction. *Romero*, 358 U.S. at 380-81, 79 S.Ct. at 484-85; *Snyder v. Whitta-*

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1. Section 1333(1) provides that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

2. The Court held that DOHSA preempts state wrongful death statutes. *Id.* at 223, 106 S.Ct. at 2494. Subsequently, we have held that survival actions under general maritime law are not preempted by DOHSA. *See Graham v. Milky Way Barge, Inc.*, 824 F.2d 376, 386-87 (5th Cir.1987) (on petition for rehearing).

ker Corp., 839 F.2d 1085, 1092 (5th Cir.1988). As we have stated, however, we need not decide whether the cause was removable, as the plaintiffs, in any event, have waived their right to seek a remand.[3]

IV.

[2] Even if this matter was improperly removed, the plaintiffs waived the opportunity to challenge the removal. That is because plaintiffs' motion for remand was untimely under 20 U.S.C. § 1447(c).[4] The plaintiffs do not dispute that they failed, as required by section 1447(c), to file a motion to remand within thirty days after defendants filed their notice of removal. Hence, after the expiration of the thirty-day period set forth in section 1447(c), the district court properly retained jurisdiction,

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3. In support of their assertion that absent diversity, a DOHSA claim cannot be removed under the general federal question jurisdiction of 28 U.S.C. § 1331, the plaintiffs refer us to a scholarly opinion by Judge Hittner in *Filho v. Pozos Int'l Drilling Servs., Inc.*, 662 F.Supp. 94 (S.D.Tex.1987). There, the court squarely held that "a claim pursuant to DOHSA fails to invoke federal question jurisdiction." *Id.* at 100.

Resourcefully, the plaintiffs also refer us to a treatise by, *inter alia*, one of defendants' counsel asserting the "removal of a saving clause case probably should not be permitted when there is no diversity of citizenship between the litigants and removal is sought solely because jurisdiction would have existed under Section 1333 *if* the case had been brought in the federal courts originally as an admiralty matter. . . ." 14 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3674, at 466 (2d ed. 1985) (emphasis in original). The defendants argue, however, that under *Tallentire*, 177 U.S. at 222-29, 106 S.Ct. at 2494-98, DOHSA actions are not saving-to-suitors cases at all but that, instead, it is § 7 of DOHSA, 46 U.S.C. § 767, that confers concurrent state and federal jurisdiction over DOHSA cases.

4. Section 1447(c) provides in relevant part that "[a] motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under [28 U.S.C.] § 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

assuming that this is an action that originally could have been brought in federal court, an issue we examine in the next section.

In their opening and reply briefs on appeal, the plaintiffs devote only one paragraph (in the reply brief) to the issue of waiver. They point out that that section applies only to motions to remand based upon "any defect in removal procedure." They aver that they never have contended that there were any *procedural* defects in the removal in this case but that their objection was based solely upon a claimed lack of subject matter jurisdiction.

[3] The plaintiffs have confused improper removal (i.e., lack of removal jurisdiction) with lack of original subject matter jurisdiction. The former is waivable, *see Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 703, 92 S.Ct. 1344, 1348, 31 L.Ed.2d 612 (1972); *Lirette v. N.L. Sperry Sun, Inc.*, 820 F.2d 116, 117 (5th Cir.1987) (en banc); the latter is not, *see Hensgens v. Deere & Co.*, 823 F.2d 1179, 1180 (5th Cir.1987); *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1297 (5th Cir.1985) (per curiam).

In this regard, section 1447(c) mentions original subject matter jurisdiction, rather than removal jurisdiction, in providing that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be removed." That phrase "refers to want of federal subject matter jurisdiction." 1A. J. Moore & B. Ringle, *Moore's Federal Practice* ¶ 0.169[1] at 675 (2d ed. 1990). When Congress has intended to refer to removal jurisdiction, it has distinguished that concept from the doctrine of original subject matter jurisdiction. *See* 45 U.S.C. § 822(e) ("original and removal jurisdiction"). Moreover, this court has had little difficulty in distinguishing between removal jurisdiction, on the one hand, and original or subject matter jurisdiction, on the other hand.[5]

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5. *See, e.g., Nolan v. Boeing Co.*, 919 F.2d 1058, 1061 (5th Cir.1990); *Ziegler v. Champion Mortgage Co.*, 913 F.2d 228, 230 (5th Cir. 1990); *Carrollton-Farmers Branch Indep. School Dist. v. Johnson &*

[4] More to the point, the plaintiffs misconstrue what is meant in section 1447(c) by the term "procedural" defect. As used in that section, a "procedural" defect is any defect that does not go to the question of whether the case originally could have been brought in federal district court:

> The motion to remand must be made within 30 days after removal, if the objections are of a character that can be waived, such as formal and modal matters pertaining to the procedure for removal *or the non-removability of a proceeding otherwise within federal jurisdiction*.

Id. ¶ 0.168[4.—1] at 644 (footnotes omitted, emphasis added). Professor Moore thus notes that section 1447(c) concerns "the following situations that may arise in a removed suit: *the action is of a nonremovable character*, or although within removal jurisdiction, defendant has not pursued the proper procedure in removing the suit." *Id.* ¶ 0.157[11.—1] at 166 (emphasis added). The former type of defect is the one at issue here, as we assume *arguendo* that the instant DOHSA claim is non-removable.

There are at least three cognizable combinations of state/federal jurisdictional defects in the context of a removed proceeding: (1) where the state court has jurisdiction but the federal court lacks original and removal jurisdiction; (2) where both state and federal courts have original jurisdiction but there is no federal removal jurisdiction; and (3) where both state and federal courts lack jurisdiction. *Id.* ¶ 0.169[1] at 676. Assuming improper removal, the instant case falls into the second category:

> In the second category, where the state court has jurisdiction of the action, the federal court has original jurisdiction of such an action, but removal of the suit at bar is not warranted, . . . the objection to the action proceeding in the federal court *is a modal and formal one*. If timely taken, the

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Craves, 13911, Inc., 889 F.2d 571, 572 (5th Cir.1989) (per curiam) (on petition for rehearing). *Accord* 1A J. Moore & B. Bingle, *supra*, ¶ 0.157[11.—4] at 174 ("original and removal jurisdiction").

> action should be remanded; otherwise, *the objection is waived, and the removed action may proceed.*

Id. at 678 (footnotes omitted, emphasis added).

Thus, in summary, "an irregularity in removal is waivable and, if waived, a federal court has power to proceed with a removed case that is within its original jurisdiction but is not one subject to removal. . . ." *Id.* ¶ 0.157 [11.—4] at 173. "[W]here the case is actually . . . within the scope of original jurisdiction . . ., all matters concerning the removal of the case to the federal court are capable of waiver. . . ." *Id.* at 175-76. Hence, the word "procedural" in section 1447(c) refers to any defect that does not involve the inability of the federal district court to entertain the suit as a matter of its original subject matter jurisdiction.

"Removal proceedings are in the nature of process to bring the parties before the United States court." *Mackay v. Uinta Dev. Co.*, 229 U.S. 173, 196, 33 S.Ct. 638, 639, 57 L.Ed. 1138 (1913). In *Mackay*, a matter was removed from state court, despite the fact that while the counterclaim exceeded the jurisdictional amount, the plaintiff's claim did not; consequently, the matter was not within the removal jurisdiction of the federal district court and thus was "irregularly removed." *Id.* Nonetheless, the Court held that as neither party had objected to removal, the district court had subject matter jurisdiction and could entertain the cause, as the counterclaim could have been brought as an original action in federal court in satisfaction of the jurisdictional-amount requirement. The "irregularity was waivable and neither it nor the method of getting the parties before the court operated to deprive it of the power to determine the cause." *Id.* at 177, 33 S.Ct. at 639.

For present purposes, the absence of removal jurisdiction in *Mackay* because of an insufficient amount in controversy is no different from the assumed nonremovability of a DOHSA claim. In both cases, the want of removal jurisdiction is for a reason that

normally would be considered "substantive": in *Mackay*, an insufficient amount in controversy[6]; here, the nonremovability of a claim brought pursuant to a particular substantive statute. Also in each, the federal district court would have had original jurisdiction if the action had been filed there in the first instance.

The result here is the same as in *Mackay*, that is, that "removal proceedings are in the nature of process." 1A J. Moore & B. Ringle, *supra*, ¶ 0.157[11.—3] (2d ed. Supp.1990). Since "removal proceedings are in the nature of process to bring the parties before the [district] court," *Mackay*, 229 U.S. at 176, 33 S.Ct. at 639, it is a waivable defect that a cause is brought to that court by means of removal rather than by an original complaint. In either event, all that is involved is the process by which the court receives the action, not the subject matter of the claim itself. Thus, when section 1447(c) speaks of "any defect in removal procedure," it includes within its reach the bringing of an action not within the court's removal jurisdiction but that could have been brought originally in that court.

We so treated the issue of waiver in *Petty v. Ideco, Div. of Dresser Indus., Inc.*, 761 F.2d 1146 (5th Cir.1985). There, removal jurisdiction was wanting under 28 U.S.C. § 1441(b), as the defendant was a citizen of the forum state. We held that, as the plaintiff made no timely objection to removal and the cause could have been brought originally in the federal district court, the plaintiff waived any objection to removal. *Id.* at 1148 n. 1. In *Ideco*, as arguably here, the matter came to the federal district court by means of a flawed *process* (*i.e.*, by removal rather than by original petition). As in *Ideco*, that procedural deficiency was

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6. "[A] jurisdictional amount requirement goes to subject matter jurisdiction and lack of it cannot be waived. . . ." 1A J. Moore & B. Ringle, *supra*, ¶ 0.157 [11.—4] at 174.

waived. The result in both cases is that the district court had jurisdiction to entertain the action.[7]

In a very recent case construing section 1447(c), we have defined "any defect in removal procedure" as "all non-jurisdictional defects existing at the time of removal." *In re Shell Oil Co. ("Shell I")*, ... , 932 F.2d 1518, 1521 (5th Cir. 1991). Thus, we held in *Shell I* that by not moving to remand within thirty days, the plaintiffs waived a removal defect existing under 28 U.S.C. § 1441(b), *to-wit*, that two of the defendants were residents of the forum state. In a companion case, we now have held that "[a]s amended, § 1447(c) requires that motions for remand must be made within 30 days of removal, *except in cases in which the court lacks subject matter jurisdiction.*" *In re Shell Oil Co. ("Shell II")*, ... , 932 F.2d 1523, 1527 n. 6 (5th Cir. 1991) emphasis added). Hence, in the instant case, as shown by the reasoning of *Shell I* and *Shell II*, original subject matter jurisdiction is not waivable, but all other defects, including defects in removal jurisdiction, are fully subject to waiver under section 1447(c).[8]

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7. The plaintiffs argue, at length, the inapplicability of *Grubbs v. Gen. Elec. Credit Corp.*, which states that "where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue . . . is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court." 405 U.S. at 702, 92 S.Ct. at 1347. We need not decide whether the rationale of *Grubbs* applies to the instant case because, in any event, the 30-day limit was added to § 1447(c) in 1988 and thus supersedes *Grubbs* in any case in which the plaintiff has not sought remand within the new time limit. *See* Judicial Improvements & Access to Justice Act, Pub.L. No. 100-702, § 1016(c)(1), 1988 U.S.Code Cong. & Admin.News (100 Stat.) 4642, 4670. "Prior to the 1988 amendment to § 1447(c), there was no fixed time limit within which the plaintiff was required to move for a remand." 1A J. Moore & B. Ringle, *supra*, ¶ 0.157[11.—5] at 180.

8. We note that the court in *Shell I*, at . . . . , thoroughly examined the legislative record regarding the 1988 amendments to § 1447(c) and observed that the relevant Congressional report explained that remand must be sought within 30 days "on any ground other than lack of subject

V.

The foregoing discussion assumes that the instant cause could have been brought originally in federal district court. We now easily conclude that it could.

[5] In their principal brief, the plaintiffs never assert that this matter could not have been filed in federal court. They seem to assume that it could have been, and they concentrate their attention on the assertion that this DOHSA claim was not subject to removal. Buried in a short footnote in the plaintiffs' reply brief there finally appears the contention that "[b]ased upon the plaintiffs' pleading, this was not a case which 'could have' been filed in federal court."[9]

[6] It is beyond doubt that although the parties can waive defects in removal, they cannot waive the requirement of original subject matter jurisdiction—in other words, they cannot confer

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matter jurisdiction." H.R. Rep. No. 889, 100th Cong., 2d Sess. 72 ("House Report"), *reprinted in* 1988 U.S. Code Cong. & Admin. News 5982, 6033. The House Report also explains,

> So long as the defect in removal procedure does not involve a lack of federal subject matter jurisdiction, there is no reason why either State or Federal courts, or the parties, should be subject to the burdens of shuttling a case between two courts that each have subject matter jurisdiction. There is also some risk that a party who is aware of a defect in removal procedure may hold the defect in reserve as a means of forum shopping if the litigation should take an unfavorable turn. . . . The amendment is written in terms of a defect in 'removal procedure' in order to avoid any implication that remand is unavailable after disposition of all federal questions leaves only State law questions that might be decided as a matter of ancillary or pendent jurisdiction or that instead might be remanded.

House Report at 72, 1988 U.S.Code Cong. & Admin.News at 6033.

9. Customarily we decline even to consider arguments raised for the first time in a reply brief. E.g., *Najarro v. First Fed. Sav. & Loan*, 918 F.2d 513, 516 (5th Cir.1990); *United States v. Clinical Leasing Serv., Inc.*, 930 F.2d 394, 395 n. 1 (5th Cir.1991) (on petition for rehearing); *Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1437 (5th Cir.1989) (citing cases); *United States v. Prince*, 868 F.2d 1379, 1386 (5th Cir.1989).

jurisdiction where Congress has not granted it. "Since the district court had no original jurisdiction over this case . . . ., a finding that removal was improper deprives that court of subject matter jurisdiction and obliges a remand under the terms of § 1447(c)." *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 1991 WL 79118 at p. *9, 1991 U.S. LEXIS 2781 at *28 (U.S. May 20, 1991). *Accord Hensgens*, 833 F.2d at 1180; *Giannakos*, 762 F.2d at 1297. Thus, once the plaintiff has waived the right to contest removal, "[t]he jurisdictional issue on appeal becomes whether the federal district court would have had jurisdiction over the case had it originally been filed in federal court." *Kidd v. Southwest Airlines Co.*, 891 F.2d 540, 546 (5th Cir.1990).

There is no doubt that a DOHSA claim can be brought as an original matter in federal district court. *Tallentire* settled this question by holding that jurisdiction was concurrent but in no way questioned the capacity of a federal district court to entertain a DOHSA claim filed there originally. When brought as an original suit in federal court, a DOHSA claim is, as the plaintiffs note, "within the *admiralty* jurisdiction." *Accord* T. Schoenbaum, *Admiralty & Maritime Law* § 7-2, at 238 (1987). This is the admiralty jurisdiction conferred by section 1333.

[7] There are special procedures for invoking the admiralty jurisdiction of a federal district court. They are explained helpfully in two cases cited to us by the plaintiffs, *Badden v. Osgood*, 879 F.2d 184 (5th Cir.1989), and *Alleman*. The specific procedures are imposed by Fed.R.Civ.P. 9(h).[10]

10. Rule 9(h) reads in relevant part as follows:

Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If

That rule requires that in order to invoke a federal court's admiralty jurisdiction *where there exists an additional ground for federal jurisdiction,* the plaintiff must identify the claim as one in admiralty to make it plain that he wishes to invoke that jurisdictional basis rather than some other. Thus, in *Bodden,* where there was diversity of citizenship and the plaintiff had given conflicting signals as to whether he wished to proceed in admiralty, we concluded that the cause must proceed as an action at law in diversity. 879 F.2d at 186. In *Alleman,* as in *Bodden,* the defendants removed on the basis of diversity. We held that as the plaintiffs had done nothing affirmative to invoke admiralty jurisdiction, the action was properly in federal court only on the basis of diversity jurisdiction and not admiralty. 756 F.2d at 345-46.

The instant plaintiffs can take no comfort in *Bodden* or *Alleman,* however, as these cases are readily distinguishable from the matter before us. Citing only these two cases, the plaintiffs argue that "[t]he only way that this case 'could have' been filed in federal court, is *if* the plaintiffs had *not* invoked the 'saving to suitors' clause and *if* the plaintiffs *had* invoked admiralty jurisdiction under Fed.R.Civ.P. 9(h)." (Emphasis in original.) What the plaintiffs overlook, however, is that by the plain language of rule 9(h) they, having waived any objection to removal, are deemed to have invoked the district court's admiralty jurisdiction. That is because here, unlike the circumstances in *Bodden* or *Alleman,* there is no alternative basis of original federal jurisdiction (such as diversity). Thus there can be no confusion as to whether the plaintiffs desired "to prosecute their action in a common law court." *Alleman, id.* at 345, i.e., on some jurisdictional basis other than admiralty.

We so conclude because in federal court (and absent diversity of citizenship), a DOHSA claim can be brought only on the

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the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not.

admiralty "side" of the docket. *See generally* 2 S. Friedell, J. Geraghty, D. Williams & E. Flynn, *Benedict on Admiralty* § 81b at 7-6 through 7-12 (6th ed. 1990). The plaintiffs observe that "a DOHSA claim is within the *admiralty* jurisdiction of federal courts and does not fall within federal question jurisdiction" and that "[t]he statute itself [46 U.S.C. § 761] provides that DOHSA suits may be maintained 'in the district courts of the United States, *in admiralty*. . .'" (Plaintiffs' emphasis.)

Rule 9(h) patently provides that "[i]f the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not." By its very terms, then, the "identifying statement" requirement of rule 9(h) applies only to a claim "that is also within the jurisdiction of the district court on some other ground" than admiralty. "*[U]nless the claim is cognizable only in admiralty*, the special practice features for admiralty claims are not applicable." *Bodden*, 879 F.2d at 186 (emphasis added).

As a consequence, these plaintiffs, having waived any objection to removal, are relegated to the admiralty jurisdiction of the federal district court, as that is the only jurisdictional basis for a DOHSA claim in federal court, absent diversity or some other jurisdictional basis. To be sure, that is not the forum that these plaintiffs have chosen, but such is the grist of the waiver mill.

In summary, this is an action that the plaintiffs *could have brought* in federal court, in admiralty. No special averment under rule 9(h) would have been required because, as a DOHSA claim, the action could have been brought only in admiralty, there being no diversity. The point is that had the plaintiffs so chosen, the federal district court would have had original subject matter jurisdiction over the claim. That is why, once any objection to removal was waived, the district court was able to retain jurisdiction.

[8, 9] The plaintiffs answer that not only did they fail to invoke admiralty jurisdiction under rule 9(h), but they also affirmatively invoked state court jurisdiction by means of the saving to suitors clause. It is certainly true that the plaintiffs had the option, which they exercised, to file in state court. It is no different from the option of many plaintiffs, in and out of the admiralty/maritime context, to select a forum. But that selection, as always, is subject to any right of a defendant to remove and to the possibility that the plaintiff may waive his right to the forum of his choice. And any such waiver carries with it the waiver of any rights or procedures peculiar to state court, such as, *inter alia*, the right to a jury or to special time limits or discovery procedures under state law and state procedural rules.[11]

In their final effort to establish that this claim could not have been brought originally in federal district court, the plaintiffs call our attention to *Armstrong v. Alabama Power Co.*, 667 F.2d 1385

11. In a post-argument brief filed by leave of court, the plaintiffs contend for the first time that the defendants never raised the issue of waiver in the district court and hence cannot urge waiver for the first time on appeal. The defendants respond that they did raise waiver in their opposition to plaintiffs' motion for new trial, reconsideration, and remand. They also note that recently in *Masinter v. Tenneco Oil Co.*, 867 F.2d 892 (5th Cir.1989), the defendant asserted a new defensive theory shortly before oral argument. We held that "[w]hen the judgment of the district court is correct, it may be affirmed on appeal for reasons other than those asserted or relied on below." *Id.* at 896 (citing *Terrell v. University of Tex. Sys. Policy*, 792 F.2d 1360, 1362 n. 3 (5th Cir.1986), *cert. denied*, 479 U.S. 1064, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987)).

We also observe that the plaintiffs appear to have waived too long to assert that defendants cannot now raise the waiver issue. "In the absence of manifest injustice, this court will not consider arguments belatedly raised after appellees have filed their brief." *Najarro v. First Fed. Savs. & Loan*, 918 F.2d at 516. In *Najarro*, the "belated" argument appeared for the time time in appellants' reply brief; here, it is raised for the first time after oral argument. In a manner of speaking, plaintiffs have *waived* the right to argue that defendants have *waived* their *waiver* argument. *See supra* note 9.

(11th Cir. 1982) (Thornberry, J., sitting by designation). In *Armstrong*, a maritime wrongful death action was brought in state court under the saving to suitors clause. A third party complaint against the United States was brought under the Suits in Admiralty Act, 46 U.S.C. § 741 *et seq.* (1975), which provided for exclusive jurisdiction in federal court. Instead of moving to dismiss, the United States removed to federal court.

The Eleventh Circuit affirmed the district court's remand to state court, which was based upon the doctrine of derivative removal jurisdiction. That doctrine, since abolished by the addition of 28 U.S.C. § 1441(e) in 1986,[12] provided that a federal court cannot obtain, through removal, jurisdiction over a claim as to which the state court had no jurisdiction. In *Armstrong* the state court had no jurisdiction over the Suits in Admiralty Act claim; thus, the federal court could not inherit that action by removal.

Here, by way of contrast, the plaintiffs fervently and accurately aver that the state court had jurisdiction over their claim. Even if section 1441(e) had not been enacted, the rationale of *Armstrong* would not apply to the instant case.

In summary, the district court properly had jurisdiction over the instant cause, once the right to contest removal was waived by the failure to raise that issue within thirty days under section 1447(c). The district court thus had jurisdiction to consider the question of forum non conveniens. We address that issue now.

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12. *See* Judicial Improvements Act of 1985, Pub.L. No. 99-336, § 3(a), 1986 U.S.Code Cong. & Admin.News (100 Stat.) 633, 637. Section 1441(e) provides that "[t]he court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim."

VI.

[10] Plaintiffs argue that the district court failed to apply the required analytical rubric in reaching its forum non conveniens determination. We have observed the need for such a methodology: "While we recognize that the decision to grant or deny a motion to dismiss for forum non conveniens is within the discretion of the district court, it should be an exercise in structured discretion founded on a procedural framework guiding the district court's decisionmaking process." *In re Air Crash Disaster Near New Orleans, La.* 821 F.2d 1147, 1165 (5th Cir.1987) (en banc) (citations omitted), *vacated on other grounds sub nom. Pan Am. World Airways, Inc. v. Lopez*, 490 U.S. 1032, 109 S.Ct. 1928, 104 L.Ed.2d 400 (mem.), *opinion reinstated on other grounds*, 883 F.2d 17 (5th Cir.1989) (en banc). In this case, plaintiffs specifically contend that the district court failed (1) to determine whether a foreign forum was available and adequate; (2) to balance public and private interest factors; (3) to impose appropriate conditions on the dismissal; and (4) to provide a meaningful framework for appellate review.

We agree with the plaintiffs' contentions. The district court incorrectly transformed its previous dismissal, based upon "improper venue," into a dismissal based upon forum non conveniens, without further comment. The court, however, did address in its previous "improper venue" dismissal order some of the factors upon which it relied in its later forum non conveniens determination.

The court considered the defendants' motion to dismiss to be unopposed and apparently based its decision upon the factual allegations contained in the complaint and the motion to dismiss. Together these documents demonstrate (1) that the plaintiffs are citizens of the Philippines; (2) that the collision occurred in the Philippines; (3) that the vessels that collided operated in the waters of the Philippines; (4) that the defendants are foreign

corporations with their principal place of business in Texas; and (5) that there are similar suits arising out of the same accident presently pending in the Philippines.[13]

Nevertheless, the plaintiffs complain that even though the defendants had the burden of persuasion on this issue, *see Air Crash, id.*, they presented no affidavits and provided only unsworn allegations. The plaintiffs also insist that while there may have been other claims pending against the defendants in the Philippines, this fact alone is not determinative of the availability or adequacy of a foreign forum. The defendants argue that this indeed was enough, and, citing *Piper Aircraft v. Reyno*, 454 U.S. 235, 253-54, 102 S.Ct. 252, 264-65, 70 L.Ed.2d 419 (1981), maintain that it was not necessary to show that the remedies available in the Philippines are similar to those in the United States. Their argument, however, is unpersuasive.

[11] The plaintiffs are correct in their assertion that the defendants have failed to show that a foreign forum was available and adequate. Such "[a] foreign forum is available when the entire case and all parties can come within the jurisdiction of that forum." *Air Crash*, 821 F.2d at 1165 (citing *Syndicate 420 at Lloyd's London v. Early Am. Ins. Co.*, 796 F.2d 821, 830 (5th Cir.1986)). And "[a] foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in an American court." *Id.* (citing *Syndicate 420*, 796 F.2d at 829) (additional citation omitted). In *Air Crash*, we held "that a moving defendant need not submit overly detailed affidavits to carry its burden, but it 'must provide enough information to

13. Apparently, the federal district courts have entertained at least one suit against Caltex regarding this collision. *See Carreon v. Caltex Philippines*, No. 90-0931, 1990 WL 142029 (E.D.La. Sept. 25, 1990).

enable the district court to balance the parties [sic] interests,"[14] *Id.* at 1164-65 (quoting *Piper*, 454 U.S. at 258, 102 S.Ct. at 267).

[12] By showing only that they were being sued in the Philippine courts by the relatives of the survivors of this maritime disaster, the defendants failed to provide sufficient information with which to support the required "procedural framework." In fact, the defendants appear to have misread *Piper*, in which the Court required that the defendant, at a minimum, demonstrate that he is "amenable to process" in the other forum. 454 U.S. at 255 n. 22, 102 S.Ct. at 265 n. 22. Furthermore, the Court held that the mere fact that a foreign court has jurisdiction over claims relating to the same cause of action does not mean that that country's law relating to the subject of the suit cannot change in the interim and thereby render the forum constructively unsuitable for presentation of the claim. *Id.* at 254-55, 102 S.Ct. at 265. Hence, as we have noted in *Svendsen* and in *Nolan v. Boeing Co.*, 919 F.2d at 1068, in order to fulfill the requirements of *Gulf Oil*, a more detailed presentation must be made by the defendants concerning the private interest factors in order that the district court can address the six-factor test.[15]

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14. In *Air Crash* we further stated that "the necessary detail [required by defendants] will depend upon the particular facts of each case." 821 F.2d at 1165 n. 28. We observed that " 'a motion to dismiss for forum non conveniens does not call for a detailed development of the entire case.' " *Id.* (quoting *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 451 n. 3 (2d Cir.1975), *cert. denied*, 423 U.S. 1052, 96 S.Ct. 781, 46 L.Ed.2d 641 (1976). It should be noted, however, that we require a defendant to put forth unequivocal, substantiated evidence presented by affidavit testimony in order for the district court to satisfy the standard enunciated in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947). *See Svendsen v. Pozos Int'l Drilling Co.*, 928 F.2d 401 (5th Cir.1991) (unpublished).

15. In determining each forum's convenience to the parties, the court must weigh the following private interest factors:

> relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the costs of obtaining attend-

The plaintiffs' second argument is that the district court did not adequately explicate the public or private interest factors. Defendants state, to the contrary, that the public factors mentioned in the record amply show that trying the case in Texas would be quite inconvenient for both parties and that the private interest factors discussed by the court demonstrate that the trial also would be a logistical nightmare.

Indeed, defendants maintain that under similar facts, the court in *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India,* 809 F.2d 195 (2d Cir.), *cert. denied,* 484 U.S. 871, 108 S.Ct. 199, 98 L.Ed.2d 150 (1987), reached the same conclusion after focusing upon the public and private interest factors. In that case, since the accident occurred in India, all the plaintiffs were citizens of India, and most of the witnesses lived in India, *id.* at 200-01, the court agreed with the district court and held that the best forum to hear the cause of action would be in that country. *Id.* at 206.

[13, 14] The plaintiffs' contention has merit. Once an adequate and available foreign forum is found to exist, the district court should consider all of the relevant private interest factors to determine each forum's convenience to the parties. *Air Crash,* 821 F.2d at 1164. If the private factors weigh in favor of dismissal, no further inquiry need be made. *Id* at 1165. Indeed, only if the court cannot determine whether such private factors

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ance of willing, witnesses; probability of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy expeditious and inexpensive. There may also be questions as to the enforceability [sic] of a judgment if one is obtained.

Air Crash, 821 F.2d at 1162 (quoting *Gulf Oil,* 330 U.S. at 508, 67 S.Ct. at 843).

weigh in favor of dismissal is it required to examine the public interest factors at all. *Id.*[16]

[15] In this instance, most of the factors that the court mentioned as the basis for its forum non conveniens determination are public interest factors that should not enter into its decision until after it resolves the six private interest factors. While the court cited in its order of dismissal that sources of proof and witnesses are located in the Philippines, it did not consider any other public or private interest factors, nor did it consider the benefits of having the case heard in Texas. The court simply described the nationalities of the parties, the place of the accident, the fact that other suits are pending against a Caltex party from this cause of action in the Philippines, and the fact that generally sources of proof and witnesses are located there. Such formulation does not provide us with an adequate opportunity to determine whether the district court attempted to satisfy the *Gulf Oil* standard by balancing the interests of the parties and by considering the relative convenience of the two forums.

Next, the plaintiffs argue that the district court failed to impose any conditions on the dismissal and that this is contrary to *Air Crash*, in which we stated that a district court must "ensure that a plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice. . . ." 821 F.2d at 1166. The defendants cite no contrary authority. Instead, they find a certain irony in citizens of the Philippines complaining that the dismissal failed to protect their right to sue in the courts of their home country.

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16. The public interest factors, as enumerated in *Gulf Oil*, include "the administrative difficulties flowing from court congestion; the local interest in having localized controversies resolved at home; the intent in having the trial of a diversity case in a forum that is familiar with the law that must govern the action; the avoidance of unnecessary problems in conflicts of law, or in application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty." *Id.* at 1162-63 (citing *Gulf Oil*, 330 U.S. at 508-09, 67 S.Ct. at 843).

The defendants' general argument overlooks many problems associated with "return jurisdiction" cases, such as statutes of limitations, political influences in the home state in favor of the opposing part, and obstruction of justice. While the district court is given the discretion to determine the conditions of dismissal or to determine that the dismissal should be unconditional under the circumstances, *see Zekic v. Reading & Bates Drilling Co.*, 680 F.2d 1107, 1109 (5th Cir.1982),[17] *Air Crash* requires the courts to ensure that plaintiffs can reinstate suits in American courts if the defendants obstruct jurisdiction in the alternative forum. 821 F.2d at 1166.

[16] Thus, courts must take measures, as part of their dismissals in forum non conveniens cases, to ensure that defendants will not attempt to evade the jurisdiction of the foreign courts. Such measures often include agreements between the parties to litigate in another forum, to submit to service of process in that jurisdiction, to waive the assertion of any limitations defenses, to agree to discovery, and to agree to the enforceability of the foreign judgment. *See, e.g., Svendsen; Union Carbide*, 809 F.2d at 198.

The district court failed to include any return jurisdiction clause in its order of dismissal. Although the defendants attempt to play down the importance of such a clause owing to the fact that the plaintiffs are residents of the alternate forum, this simplified analysis does not appear to satisfy the *Air Crash* test. While we assume that Caltex companies are defending a number of cases already in the Philippine courts, concerning this specific accident, plaintiffs would have no guarantee that the defendants will submit to the jurisdiction of the court in this instance or will waive any limitations defenses. The defendants, however, have mentioned in their briefs that they would be amenable to having the case remanded to the district court to place such conditions in

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17. *Zekic* was overruled on other grounds by *Air Crash*.

the order of dismissal. While such conditions probably would not solve the *Gulf Oil* problems, they would enable the plaintiffs to secure the opportunity to litigate their case in another forum.

Finally, the plaintiffs insist that the district court failed to set out its findings and conclusions supporting the motion to dismiss for forum non conveniens and that this deficiency precludes meaningful appellate review. In *Air Crash*, we stated that "[i]f we are not supplied with either a written or oral explanation of the court's decision we will not be reluctant to vacate the lower court's judgment and remand because we do not perform a de novo resolution of *forum non conveniens* issues." 821 F.2d at 1166 n. 32 (citing *La Seguridad v. Transytur Line*, 707 F.2d 1304, 1308 (11th Cir.1983)).

Thus, the district court has failed to follow this circuit's analytical framework for dismissing a case on forum non conveniens grounds. It appears to have generalized, from a number of public interest factors, that these specific plaintiffs should have no problem in bringing their suit against the defendants in their home country, as some persons apparently have done. In so concluding, the court has not observed the procedural safeguards developed by the Supreme Court and by this court to guarantee that such litigants have a fair opportunity to litigate in the alternate forum and that if the defendants refuse to submit to such jurisdiction, the plaintiffs can litigate their own claims in American courts.

Accordingly, we remand so that the district court can begin afresh its forum non conveniens determination. In its discretion, it may wish to permit the parties to make additional submission on this issue. We intimate no view as to what ultimate decision the court should make on the forum non conveniens issue, as this is a matter within the court's discretion.

The judgment of dismissal is VACATED, and this matter is REMANDED for further proceedings in accordance with this opinion.

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

VICTOR C. BARIS, *et al.*, *Plaintiffs*, vs. SULPICIO LINES, INC., *et al.*, *Defendants*.	CIVIL ACTION NO. H-90-607

ORDER

Pending before the Court is Plaintiffs' Motion for New Trial, for Reconsideration, and for Remand (instrument number 8). Having considered the motion and response, as well as the applicable law, the Court is of the opinion that the portion of the motion seeking reconsideration should be granted in part and those portions seeking new trial and remand should be denied.

This cause was filed in state district court on December 20, 1989 alleging wrongful death and survival causes of action as a result of a collision between two ships at the Tablas Straits, between Mindoro and Marinduque Islands in The Philippines. The case was brought "pursuant to the laws of the United States, including the general maritime law, and, pursuant to the saving to suitors cause, 28 U.S.C. § 1333(1), as well as such other federal and state laws as may be applicable including § 17.031 of the Texas Civil Practice & Remedies Code." Plaintiffs' Amended Petition, at 16.

Notice of removal to federal district court was filed on February 21, 1990. On March 2, 1990, Defendants filed a motion to

dismiss. Plaintiffs did not respond to either the notice of removal or the motion to dismiss. On April 10, 1990, this Court entered an order dismissing this cause for improper venue pursuant to F. R. Civ. P. 12(b)(3). Plaintiffs contend that this dismissal order is void for lack of subject matter jurisdiction. Plaintiffs argue that the facts herein do not give rise to a basis for proper removal due to a lack of a federal question, and this Court is therefore without subject matter jurisdiction; if the Court is without subject matter jurisdiction, then all orders are void and the case must be remanded.

Defendants contend that the case was properly removed due to the presence of a federal question in the wrongful death cause of action. Defendants correctly argue that the wrongful death cause of action is governed by the Death on the High Seas by Wrongful Act ("DOHSA"), 46 U.S.C. § 762 *et seq.* It is clear that concurrent jurisdiction is preserved in DOHSA, but state wrongful death statutes are preempted by DOHSA where an accident occurs on the high seas. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 232 (1986). Furthermore, the DOHSA is the exclusive remedy for a wrongful death on the high seas. *Id.* A DOHSA claim may properly be brought in state court even though DOHSA is the exclusive remedy for a wrongful death on the high seas. *Filho v. Pozos Intern. Drilling Services, Inc.*, 662, F. Supp. 94, 98 n.4 (S.D. Tex. 1987) (citing, *Offshore Logistics*, 477 U.S. at 221). Where there is concurrent jurisdiction, the claim may be removed where some basis for federal jurisdiction, other than admiralty, exists. *Poirrier v. Nicklos Drilling Co.*, 648 F.2d 1063, 1066 (5th Cir. 1981). Once a wrongful death case has been brought in state court, however, it is not removable because DOHSA grants only admiralty jurisdiction. *Filho*, 662 F. Supp. at 98.

It is the conclusion of this Court that the DOHSA cause was improperly removed. Improper removal, however, does not nec-

essarily mean that the case should be remanded. If a case has been improperly removed, the federal court has subject matter jurisdiction if the case could have originally been filed in federal court. *Lirette v. N. L. Sperry Sun, Inc.*, 820 F.2d 116 (5th Cir. 1987).

A general maritime law survival action is permitted to supplement a DOHSA claim. *Graham v. Milky Way Barge, Inc.*, 824 F.2d 376, 387 (5th Cir. 1987) (citing *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 894 (5th Cir. 1984)). Where a survival claim is brought under general maritime law, then it is an *in personam* action and the saving to suitors clause permits it to be brought in state court. *Azzopardi*, 742 F.2d at 894. Where a plaintiff has chosen to bring a maritime cause of action in state court, removal is not proper and the federal court must remand such cause, in the absence of any substantial independent federal question or diversity of citizenship, in accordance with the saving to suitors clause. *See Holcomb v. Era Helicopters, Inc.*, 618 F. Supp. 339, 344 (D.C. La. 1985). Even though the general maritime claim in the instant case could not be removed, it is removable under the doctrine of pendent jurisdiction because it is joined with the DOHSA claim. *See Romero v. International Terminal Operating Co.*, 358 U.S. 351, 380-81 (1959).

Even though the DOHSA claim should not have been removed, the dismissal order is not void for lack of subject matter jurisdiction, because the claim pursuant to DOHSA could have originally been brought in federal court. The current motion to remand should therefore be denied.

Plaintiffs request that this Court set aside the dismissal order because no serious misconduct or prejudice to the Defendants exists. The Court concludes that the conduct of Plaintiffs' counsel did not reach the level of "mistake, inadvertence, surprise or excusable neglect" as required by F. R. Civ. P. 60(b).

Furthermore, it was not this conduct that brought about the dismissal of the cause.

Upon further reconsideration of the order of dismissal, this Court concludes that the Motion to Dismiss should have been granted based on *forum non conveniens*, and not based on F. R. Civ. P. 12(b)(3). Even though improper venue cannot be attacked on removal, defendant may still attack the federal court venue as inconvenient under *forum non conveniens*. *Hartford Fire Ins. Co. v. Westinghouse Electric Corp*, 725 F. Supp. 317, 320 (S.D. Miss. 1989).

It is therefore ORDERED that the motion for new trial and for remand be denied.

It is further ORDERED that the Court's order entered on April 10, 1990 be amended to reflect that dismissal of the cause should be for *forum non conveniens*.

SIGNED this 13th day of June, 1990.

KENNETH M. HOYT
United States District Judge

CONSTITUTIONAL PROVISIONS AND STATUTES

28 U.S.C. § 1447(c). Procedure after removal generally

A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a) [28 USCS § 1446(a)]. If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

28 U.S.C. § 1333(1). Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

28 U.S. CONST. amend. VII. Trial by jury in civil cases.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

LEGISLATIVE HISTORY

Excerpt from Report of the House Judiciary Committee, H. R. Rep. No. 889, 100th Cong., 2d Sess. 72, *reprinted in* 1988 Cong. & Admin. News 5982, 6033:

> Subsection (c) amends 28 U.S.C. 1447(c) and adds a new subsection (e). Section 1447(c) now appears to require remand to state court if at any time before final judgment it appears that the removal was improvident. So long as the defect in removal procedure does not involve a lack of federal subject matter jurisdiction, there is no reason why either State or Federal courts, or the parties, should be subject to the burdens of shuttling a case between two courts that each have subject matter jurisdiction. There is also some risk that a party who is aware of a defect in removal procedure may hold the defect in reserve as a means of forum shopping if the litigation should take an unfavorable turn. The amendment provides a period of 30 days within which remand must be sought on any ground other than lack of subject matter jurisdiction. The amendment is written in terms of a defect in "removal procedure" in order to avoid any implication that remand is unavailable after disposition of all federal questions leaves only State law questions that might be decided as a matter of ancillary or pendent jurisdiction or that instead might be remanded.